

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
REPLY BRIEF**

77-4127

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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ACHWAN HORNG,

Petitioner,

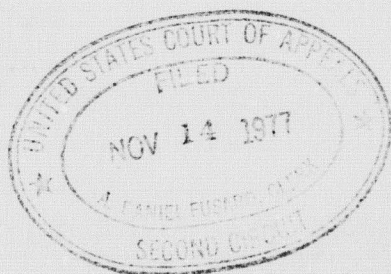
- v -

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.
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Docket No. 77-4127

REPLY BRIEF OF PETITIONER



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REPLY BRIEF OF PETITIONER

COUNTER STATEMENT OF FACTS

A. The Alleged "Chinese Interpreter
Employed by the Service"

Respondent states at page 4 of its brief that "a Chinese interpreter employed by the Service was present at the hearing and interpreted the proceedings." The statement is followed by no reference to the administrative record or appendix. It is wholly inaccurate and unsupported by the record.

As late as January 20, 1977, ten months after the alleged hearing (and after the Board of Immigration Appeals considered the instant case without benefit of any transcript), no transcript had yet been prepared. (Respondent's Brief, p. 9, n. 17).

A two-page fragmentary transcript was subsequently supplied for purposes of this appeal (AR 161, 162), denoted by respondent as pages "1" and "2". The date of the hearing nowhere appears in the fragmentary transcript proper, prepared nearly a year after the supposed hearing. Nowhere on these two pages is there any indication of who interpreted the hearing or whether the interpreter in question was an employee of the Immigration and Naturalization Service ("INS" or "Service"). Any allegations to the contrary are outside the record presently before this Court. This deviation from the record is material as the procedure for utilizing and swearing in an interpreter is strictly controlled by regulation compliance, with which is nowhere evidenced by the transcript. 8 C.F.R. § 242.12 provides:

Interpreter. Any person acting as interpreter in a hearing under this part shall be sworn to interpret and translate accurately, unless the interpreter is an employee of the Service, in which event no such oath shall be required.

B. The Alleged Offer of an Attorney "At the Outset"

Respondent then states that "at the outset Judge Schonfeld asked Horng if he wished to have an attorney represent him and he declined." Respondent references page 162 of the administrative record. Page 162 of the administrative record is the last page of the partial transcript and contains a reference by the judge as follows: "I asked you in the first place if you wanted a lawyer and you said no."

This again verifies that the transcript provided by respondent is incomplete. There is no portion of the two-page transcript fragment in which the judge offered petitioner a lawyer and petitioner responded with an answer "no." The colloquy which is reproduced on the two-page transcript is the conclusion of the hearing, not its "outset." Page 161 of the administrative record (Page "1") has no reference to the right to counsel at all. The reference to counsel, being discussed "at the outset", which appears on page 162 has been glossed by respondent as being the equivalent of a transcript of the opening of the hearing.

As both statute and regulation specifically mandate that deportation hearings be conducted "only" upon a "verbatim record,"* and respondent contends that petitioner "waived" his right to retain counsel, respondent's inaccurate intimation that there is a transcript of the "outset" of the hearing in which the right to counsel was flatly refused is materially misleading.

C. The Alleged "Admissions"

Startlingly, respondent then baldly states on pages 4 and 5 of its brief that Horng "admitted his deportability by pleading guilty to the factual allegations set forth in the order to show cause" and support this bald statement by admitting that the transcription of the tape recording began "due to mechanical difficulties after Horng had admitted 'the alleged' deportability"!

That this distortion of the record is both material and misleading is obvious. Once again, respondent goes off the record

before the court in an attempt to gloss statutory and regulatory violations. That respondent takes out its crystal ball in footnote 11 on page 5 and attempts to extrapolate and verify the "admissions" which nowhere appear on any transcript denigrates both the letter and spirit of the regulatory procedures designed to assure fairness as is more fully developed in the argument below.

Respondent continues this tactic where it states that "the fact that Hornig admitted to overstaying his deportation is clearly established by the decision and order entered by Judge Schonfeld which states that his finding of deportability was based on the alien's admissions." Such extrapolations which attempt an "end-run" around the regulations which require that deportation hearings be held "only" upon a "verbatim record" constitute plain admissions of regulatory violations and amount to literally conjuring a record. Moreover, the decision entered by Judge Schonfeld upon a printed form contained the printed statement concerning the alleged admissions signal the frequency with which such "admissions" are found by immigration judges at deportation hearings.

D. The Alleged "Waiver" of the Right to Counsel

Respondent itself states that "Hornig, apparently confused about his right to counsel, inquired whether he could have a lawyer within this thirty-day period," near the conclusion of the hearing. Respondent's Brief, page 5.

Any reasonable reading of the colloquy between petitioner and the Immigration Judge at the conclusion of the hearing must result in the conclusion that Horng was not only "confused about his right to counsel" at that late juncture in the hearing referenced by respondent, but that petitioner remained confused and was literally bullied into silence by the judge and finally cowed into accepting a decision which materially misled petitioner.

The colloquy was as follows:

"(IMMIGRATION JUDGE TO RESPONDENT)

. . . Do you accept my decision, sir?

A. Sir, if within those 30 days can I hire a lawyer?

Q. Well, if you want to have a lawyer we'll cancel the whole proceedings they'll put your case over. Do you want to have a lawyer?

A. (no answer)

Q. I asked you in the first place if you wanted a lawyer and you said no.

A. Sir, I can't hire a lawyer today because I don't have any money.

Q. Well, if you're going to hire a lawyer I'll give you until Friday, that's it. ... to get a lawyer.

A.(no answer)

Q. Are you working?

A. (no answer)

Q. If you wa-nt [sic] a lawyer sir, I'll give you until Friday.

A. (no answer)

Q. What do you want to do, sir? You want to accept my decision or do you want to get a lawyer?

A. Okay, I accept your decision.

IMMIGRATION JUDGE:

Service waives, mr. Sherman?

MR. SHERMAN:

Yes, your honor.

IMMIGRATION JUDGE:

Okay, sir."

Initially, belying the court's summary of what occurred at the hearing "at the outset", petitioner, at the end of the hearing, asked if he had a right to hire a lawyer. Petitioner then reiterated his request and stated that he could not hire a lawyer on the day of the hearing because he did not have any money.

The judge then decided to give petitioner until Friday of the week of the hearing to get a lawyer and stated just that. "I'll give you until Friday." Backtracking on this decision, the judge then once again asked petitioner whether he wanted a lawyer. The transcript indicates that the petitioner either did not understand the question, did not hear the question, or was too surprised that the question was once again being posed to him to provide an answer.

The transcript clearly indicates that no answer was given to this question. Confusingly, the judge followed this period of silence by once again asking the petitioner whether he wanted a lawyer with the question: "You want to accept my decision or do you want to get a lawyer?" At that juncture the decision referenced was the decision to get a lawyer by Friday or the alternative of getting a lawyer on the day of the hearing. The response of petitioner, "Okay, I accept your decision" can hardly be deemed a knowledgeable, voluntary, and knowing waiver of a right where the petitioner was plainly asked the question until he came up with the answer the judge was looking for.

That respondent states that "the record before this Court demonstrates that Horng effectively waived his right to counsel," and further states that "he was advised on three separate occasions that he had the right to retain an attorney," is at best tenuous in light of the simple fact that respondent clearly requested an attorney after the alleged second occasion upon which he was supposedly advised of his right to counsel. The request was wholly ignored and swept under the rug by reiterating the question until petitioner was silenced.

E. The Alleged "Waiver" of Right to Appeal

Most startling is respondent's assertion that petitioner waived his right to appeal. ("The decision of Judge Schenfeld on

3/3/76 clearly indicates that Horng waived his right to appeal." Respondent's Brief, p. 17.) Nowhere on the transcript, in direct violation of regulation, is his right to appeal even referenced, let alone explained to him, let alone waived. That respondent would assert that petitioner's "acceptance" of the judge's decision constituted a waiver of the right never explained to him is simple fantasy.*

Respondent thus suggests that the right to appeal is non-existent where in respondent's estimation there is "acceptance" of a decision by a potential deportee. Respondent virtually argues that whenever the Immigration and Naturalization Service prevails at a deportation hearing, no right to appeal attaches and the right to appeal suddenly disappears. Such circular reasoning would effectively repeal every regulatory safeguard at every hearing at which the initial determination was not favorable to a deportee.

F. Failure to Provide a Transcript and Failure to Forward the Transcript on Appeal

At page 9 of its brief, respondent states that the Board of Immigration Appeals made its decision "despite the lack of a transcript of the deportation proceeding".

The Board of Immigration Appeals thus considered the within allegations of due process violations without benefit of a transcript and therefore could not have considered the issues presently before

* "Horng decided to 'accept' the Judge's decision and the appeal to the Board was therefore considered waived by Judge Schonfeld." Respondent's Brief. p. 18.

the Court. It confirms additionally that respondent violated another regulation by failing to forward the record to the Board upon appeal as will be further developed below. See, 8 C.F.R. § 3.5.

G. The Wholesale Failure to Advise
Petitioner of His Rights

Nowhere on the partial transcript provided by respondent was petitioner advised of his right to have a reasonable opportunity to examine and object to the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government. This failure is in direct violation of 8 C.F.R. § 242.16(a) as is more fully developed below.

ARGUMENT

I. THE BOARD OF IMMIGRATION APPEALS HAS SANCTIONED STRIPPING PETITIONER OF EVERY REGULATORY, STATUTORY AND PROCEDURAL SAFEGUARD PROMULGATED BY RESPONDENT ITSELF IN MARKED CONFLICT WITH THE DECISIONS OF EVERY CIRCUIT COURT WHICH HAS RULED ON DEPRIVATIONS OF RIGHTS FAR LESS EXTREME THAN THE INSTANT CASE AND IN MARKED CONFLICT WITH PRIOR DECISIONS OF THE UNITED STATES SUPREME COURT.

A. The Litany of Regulation and Statutory Violations

1. Failing to keep a record

8 C.F.R. § 242.15, styled "contents of record" provides as follows:

The hearing before the special inquiry officer, including the testimony, exhibits, applications, and requests, the special inquiry officer's

decision, and all written orders, motions, appeals, briefs, and other papers filed in the proceedings shall constitute the record in the case. The hearing shall be recorded verbatim except for statements made off the record with the permission of the special inquiry officer. (emphasis supplied)

This regulation is based on specific statutory language which provides that the "determination of deportability in any case shall be made only upon a record. . . ." 8 U.S.C. §-1252(b) (emphasis supplied). In addition, the statutory authorization specifically provides that the regulations prescribed "shall be the sole and exclusive procedure for determining the deportability of an alien. . . ." 8 U.S.C. § 1252(b). (emphasis supplied)

The instant record contains plain admissions by respondent that a verbatim record was not maintained by respondent severely hampering the instant appeal. Moreover, the appeal to the Board of Immigration Appeals was made virtually meaningless by the failure to have a verbatim record before that body at the time of the appeal. As will be discussed below, failing to keep an accurate record in petitioner's case works invidious discrimination against him by thus hampering the appeal process. See, Griffin v. Illinois, 351 U.S. 12 (1951).

2. Wholesale failure to advise petitioner of his rights to present evidence, object to evidence and cross-examine witnesses

8 C.F.R. 242.16, styled "hearing" provides:

The special inquiry officer shall advise the respondent that he will have a reasonable opportunity to examine and object to the

evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the government. . . .(emphasis supplied)

Obviously, examination of the instant fragment of transcript confirms that none of the above rights were given to the present petitioner despite the mandatory language.

3. Failing to forward the record on appeal

8 C.F.R. § 3.5, styled "Forwarding of record on appeal", provides as follows:

If an appeal is taken from a decision, as provided in this chapter, the entire record of the proceeding shall be forwarded to the Board by the officer of the Service having administrative jurisdiction over the case upon timely receipt of the briefs of the parties, or upon expiration of the time allowed for the submission of such briefs.

Obviously, respondent fully admits having breached this regulation when it states at page 9 of its brief that the Board of Immigration Appeals considered the instant appeal without a transcript of the deportation hearing. Only upon petitioner seeking judicial review of that decision has any transcript been produced at all.

4. Failing to provide petitioner with adequate notice of the deportation hearing

8 C.F.R. § 242.1(b) plainly provides as follows:

The order [to show cause] will call upon the respondent to appear before a special inquiry officer for hearing at a time and place specified in the order not less than 7 days after the service of such order. . . .

In the instant case, the order to show cause plainly gives petitioner twenty-four hours to appear at the deportation hearing. The order to show cause was served on February 25, 1976 at 12:10 p.m., and petitioner was ordered to appear at 1:00p.m. the following day, February 26, 1976. (AR 165).

That respondent states that the hearing took place on March 3, 1976 (Respondent's Brief, p. 4), with a passing reference to page 160 of the administrative record which was a cover page to a transcript of a hearing not transcribed according to respondent until ten months after the hearing (Respondent's Brief, p. 9, n. 17), is again a brazen distortion of the record. Respondent would have this Court believe that the order to show cause informed petitioner of the wrong date for the deportation hearing and that through some procedure no evidence of which is presently before the Court, the hearing date was postponed by one week to comply with the relevant regulation. The order of the Immigration Judge finding petitioner deportable nowhere states that the hearing took place on any specific date. This is material as petitioner has challenged the constitutional sufficiency of twenty-four hours' notice of the hearing. See, Brief in Support of Petition to Set Aside Order of Deportation.

5. Failure to translate rights appearing
on order to show cause

Respondent states and stresses in its argument of law that the rights appearing on the reverse side of the order to show cause were translated to petitioner (Respondent's Brief, p. 15). As the attached exhibit reveals, when such translation occurs, the following language appears on the order to show cause. "This form has been

read and explained in the Chinese language." S/ translator."

In the instant case, at the bottom of the notice to respondent (the reverse side of the order to show cause), AR 165, there is a reference to an interpreter's initials, but no reference as to what the interpreter accomplished or did with the order to show cause. There is specifically no verification that such rights were indeed translated, and respondent itself notes that the interpreter* was "of assistance" in serving the order to show cause, not translating it

6. Failure to advise of right to appeal

8 C.F.R. § 242.19(b) provides as follows:

An oral decision shall be stated by the special inquiry officer in the presence of the respondent and the trial attorney, if any, at the conclusion of the hearing. Unless appeal from the decision is waived, the respondent shall be furnished with a notice of appeal, Form I-290A and advised of the provisions of 242.21 [appeals methods].

This regulation, as the others previously cited, was totally ignored by the special inquiry officer. Respondent's statement that "accepting" the decision of a special inquiry officer somehow transmutes to waiving a right to appeal of which petitioner was never informed is nonsensical.**

II. THE ABSENCE OF CLEAR COMMUNICATION OF RIGHT TO OBTAIN COUNSEL AND WHOLESALÉ DE FACTO REPEAL OF EVERY REGULATORY SAFEGUARD VIOLATES DUE PROCESS.

A. Due Process As Applied to Aliens in Deportation Hearings Generally

Seventy-five years ago Justice Harlan stated that "this Court has never held, nor must we now be understood as holding that

* Respondent's Brief, p. 3, n. 6

** Respondent's Brief, p. 17

administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law'. The Japanese Immigrant Case, 189 U.S. 86 (1902).

Where procedural due process for aliens is challenged, the Supreme Court remains vigorous in its protection:

"Even one whose presence in this country is unlawful, involuntary, or transitory, is entitled to that constitutional protection [cit. omitted]. . . that protects every one of these persons [aliens] from deprivation of life, liberty, or property without due process of law. [cit. omitted]" Mathews v. Diaz, 426 U.S. 67, 77 (1976). See also, Robert E. Hampton, Ch'm'n. United States Civil Service Comm., et al. v. Mow Sun Wong, 426 U.S. 88 (1976).

Thus, it has never been questioned that "an alien subjected to deportation proceedings is entitled to due process of law. [cit. omitted]" Chlomos v. INS, 516 F.2d 310 (3d Cir. 1975). See also, Burquez v. INS, 513 F.2d 751 (10th Cir. 1975); Barthold v. INS, 517 F.2d 689 (5th Cir. 1975); Castaneda-Delgado v. INS, 525 F.2d 1295 (7th Cir. 1975); Ramirez v. INS, 550 F.2d 560 (9th Cir. 1977); United States v. Gasca-Kraft, 522 F.2d 149 (4th Cir. 1975).

Instructive in the inquiry as to what procedural safeguards are constitutionally necessary at deportation hearings is Bridges v. Wixon, 326 U.S. 136 (1945).

"We are dealing here with procedural requirements prescribed for the protection of the alien. Though deportation is not technically a criminal proceedings, it visits a great hardship on the individual and deprives him of the right to stay and live and

work in this land of freedom. That deportation is a penalty - at times a most serious one - cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness." 326 U.S., at 154. (emphasis supplied)

The Supreme Court of the United States has held that essential standards of fairness require that deportability be proven by "clear, unequivocal and convincing evidence"* in light of the "drastic deprivation" of deportation. Woodby v. INS, 385 U.S. 276, 285 (1967).

B. What Does Due Process Require--
General Considerations

"Once it is determined that due process applies, the question remains what process is due." Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

The issues properly framed are the "education attainment" of a deportee, see, Goldberg v. Kelly, 397 U.S. 254, 268 (1970), the need for skill in evaluating the complexity of the rights at stake, see, Gagnon v. Scarpelli, 411 U.S. 778; 787 (1973), the "nature" of the liberty or property interest in question, see, Goss v. Lopez, 419 U.S. 565, 575-576 (1974); Board of Regents v. Roth, 408 U.S. 564, 570-571 (1972), and a resultant decision as to how best to balance the factors.

The "nature" of the right at stake at a deportation hearing is of paramount importance.

* This evidentiary standard is now found in 8 C.F.R. 242.14(a) sufficiency.

The Supreme Court has termed deportation "a great hardship", Bridges v. Wixon, supra, at 154, and a "drastic deprivation". Woodby v. INS, 385 U.S. 276, 285 (1967).

Secondly, the "education attainment" of a non-English-speaking alien with respect to knowledge of deportation law must be deemed at least as lacking as a parolee or probation violator's knowledge of the criminal law defined in his own language, in his own country.

More significantly, the Supreme Court's compilation of the litany of administrative and judicial procedures attendant the deportation process is an eloquent argument for the meaninglessness of a deportation procedure being carefully structured to protect rights of aliens when those aliens are allowed to wander aimlessly through the complex maze without the aid of counsel. See, Cheng Fan Kwok v. INS, 392 U.S. 206, 208-210 (1970).*

This is nowhere better illustrated than the instant case where presence of counsel would have precluded the "admissions" to legal questions of which petitioner was totally ignorant and incompetent to testify which was the sole basis for the Immigration Judge's findings. (Respondent's Brief, p.).

The deportation of a non-English-speaking alien thus calls for strict compliance with pertinent regulations. A "great hardship" is being vested upon an alien of limited relevant knowledge where complex issues are determinative.

*Citing only one example, is it even possible that an alien will know that "a suspension of deportation must be requested prior to or during the deportation hearing"? Cheng Fan Kwok, at 216.

C. Violations of Regulations Which Are the
Sole and Exclusive Procedure for Determining
Deportability and Assuring the Rights of
Petitioner Violates Due Process

Not only are the regulations statutorily styled "the sole and exclusive procedure for determining. . .deportability. . .", 8 U.S.C. § 1252(b), (emphasis added), but the Supreme Court has stated that the regulations "assure" fairness:

"It is useful first to summarize the relevant provisions of the Immigration and Nationality Act and of the regulations promulgated under the Act's authority. Section 242(b) provides a detailed administrative procedure for determining whether an alien may be deported. It permits the entry of an order of deportation only upon the basis of a record made in a proceeding before a special inquiry officer, at which the alien is assured rights to counsel, to a reasonable opportunity to examine the evidence against him, to cross-examine witnesses, and to present evidence in his own behalf." Cheng Fan Kwok v. INS, 392 U.S. 206, 208-9 (1968) (emphasis supplied).

In United States v. Shaughnessy, 347 U.S. 26 (1953), where the deportability of an alien was a foregone conclusion, Justice Clark reversed the affirmation of a deportation order on the sole grounds that the regulations for suspending deportation proceedings were not followed.

"Regulations. . .with the force and effect of law. . .supplement the bare bones of § 19(c). The regulations prescribe the procedure to be followed in processing an alien's application for suspension of deportation." 347 U.S., at 265.

The Court then explicated the result of ignoring the regulations which have "the force and effect of law."

"Of course, he may be unable to prove his allegation before the District Court; but he is entitled to the opportunity to try. If successful, he may still fail to convince the Board or the Attorney

General, in the exercise of their discretion, that he is entitled to suspension, but at least he will have been afforded that due process required by the regulations in such proceedings.

Reversed." 347 U.S., at 267.

The Supreme Court thus summarily equated violations of INS regulations by the INS as violative of due process.

The failure of the INS to follow its own administrative rules and regulations herein similarly violates due process.

The rule of Accardi was recently invoked in Hupart v. Bd. of Higher Ed. of City of New York, 420 F.Supp. 1087, 1107 (S.D.N.Y. 1976), wherein the Court (per Frankel, D.J.) stated:

"It is by now familiar law that an agency's violation of its own regulations may in and of itself constitute a violation of due process. See, e.g., Accardi v. Shaughnessy, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954); United States v. Leahey, 434 F.2d 7 (1st Cir. 1970); Sangamon Valley Television Corp. v. United States, 106 U.S. App. D.C. 30, 269 F.2d 221 (1959). 'An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down.' United States v. Heffner, 420 F.2d 809, 811 (4th Cir. 1969). Such deviations 'cannot be reconciled with the fundamental principles that ours is a government of laws, not men.' Hammond v. Lenfest, 398 F.2d 705, 715 (2d Cir. 1968).

* * *

"The sweep of the doctrine is broad. Its applicability does not turn upon the formality of the embodiment of the pertinent policy. See, e.g., United States v. Heffner, supra, 420 F.2d at 812 (IRS instructions); Smith v. Resor, 406 F.2d 141, 143-44 n.2, 146 (2d Cir. 1969) (Army newsletter); Sangamon Valley Television Corp. v. United States, 374 U.S. 109, 115-17, 83 S.Ct. 1828, 10 L.Ed.2d 778 (1963) (prior congressional behavior). This is so because the same 'danger of inconsistent treatment also exists when an agency departs from

an unpublished rule or informal practice." Note, Violations by Agencies of Their Own Regulations, 87 Harv. L. Rev. 629, 636 (1974). See also, United States v. Heffner, supra, 420 F.2d at 812. It is also irrelevant that the policy may be 'more generous than the Constitution requires.' United States v. Heffner, supra. See also, Service v. Dulles, 354 U.S. 363, 388, 77 S.Ct. 1152, 1 L.Ed.2d 1403 (1959)."

There exists here no reasons why this wise and just rule should not be applied. Petitioner was deprived of virtually every right granted by statute or rule to persons in his position, and as a result he is currently unjustly subject to deportation.

Respondent states that the INS "has enacted procedures which accord fundamental fairness to every alien. . ." and that "[t]he results, incorporated into the Act at § 242(b)(2-4), 8 U.S.C. § 1252(b)(1-4), and the regulations of 8 C.F.R. § 242, grant each alien in a deportation proceeding a number of due process rights which insure a fair hearing." (Respondent's Brief, p. 11) (emphasis supplied). Respondent attempts to gloss over its blatant en banc violations of the very regulations concededly promulgated for petitioner's protection by stating that "[w]hile adherence to these procedures is clearly preferable, the fact that some irregularity or error may have been committed does not, by itself, make the hearing unfair or justify judicial intervention to invalidate the proceeding." (Respondent's Brief, p. 11). The cases cited to support the notion of mere "irregularity" are wholly inapposite.

In Cheung v. I.N.S., 418 F.2d 460, 465 (D.C. Cir. 1969), the

Court vacated a deportation order and "remanded for further proceedings that will scrupulously comply with the Regulations issued by the Service and provide all the safeguards contemplated therein."

Not only does the Cheung case fail to support the contention for which respondent cites it, but, in a portion of the opinion exactly on point with the instant case, it entirely refutes and undercuts respondent's argument that any "irregularities" in petitioner's deportation hearing fall within the ambit of harmless error for the reason that petitioner was allegedly deportable (e.g. Respondent's Brief, p. 14):

3. The significance of petitioner's
conceded deportability

Throughout the opinion of the Service denying a reopening and the brief of Government counsel runs the thread of immateriality - What difference does this make, what prejudice can be shown, since petitioner is patently deportable?

While there is limited room in administrative law for the doctrine of harmless error this must be used gingerly, if at all, when basic procedural rights are at stake.

Though it is not a perfect analogy it is not immaterial that the doctrine that a conviction may be affirmed notwithstanding denial of a constitutional right - if it is established beyond a reasonable doubt that the error did not contribute to the result - is a principle that is subject to the qualification that some rights, like the assistance of counsel, are so basic to a fair trial that their infraction can never be treated as harmless error.

While petitioner's counsel raised the possibility of legal problems perhaps there is

more significance in his comments that a lawyer could be helpful to an alien even if deportability seemed clear. He might at a minimum advise the alien where to be deported. He might seek more time for a voluntary departure, and perhaps make arrangements to process a claim for a preference, and for departure to another country as a point to seek lawful entry. He might in appropriate cases arrange interim bail.

The case is apparently one where the Service has failed to comply with its regulations even though the alien was a man arrested without a warrant and processed on an assumption of waiver of counsel. We say "apparently" because the record is not as clear as we should like, and if anything turned on the point we might proceed by way of remand without reversal. And in some other case a court might well invoke the doctrine of harmless error to avoid reversal. But this particular case involves neither a long hearing completed nor a long rehearing on remand. We think it in the interest of justice to vacate the deportation order and remand for further proceedings that will scrupulously comply with the regulations issued by the Service and provide all the safeguards contemplated therein.

Id. at 464-465 (footnotes omitted).

In Corniel-Rodriguez v. I.N.S., 532 F.2d 301 (2d Cir. 1976), the Court reversed an order of deportation due to the failure of the Government to comply with a Regulation requiring it to "warn an alien [issued a visa as a child], when appropriate, that he will be inadmissible as such an immigrant if he is not unmarried at the time of application for admission. . . ." 22 C.F.R. § 42.122(d) (modified in 1976). The Court, in reversing the order of deportation, stated: "[w]e do not, of course, suggest that noncompliance with any regulation, no matter how minor its impact or importance, will automatically prevent the Government from deporting an illegal alien." Corniel-Rodriguez

v. INS, supra, at 307, n. 18. To label the present "irregulatities" by respondent, including the violation of such basic rights as maintaining a record and advising petitioner of his right to counsel, as "minor" is certainly not what the Court in Corniel contemplated.

In the instant case, respondent is attempting, by innuendo and guesswork, to gloss over a myriad of fully conceded regulatory violations by distorting facts and suggesting new procedures. Respondent concedes a verbatim record was not maintained, attempts to gloss over the ambiguous state of the record with respect to the date of the hearing, concedes petitioner was not informed of his right to present evidence, object to evidence or cross-examine witnesses, concedes petitioner was not informed of his right to appeal, conjures the facts with respect to whether the interpreter who translated what fragmentary transcript remains extant was properly sworn, and asks the Court to affirm deportability "admitted" on a portion of an alleged tape nowhere to be found but which respondent contends affirms deportability by "clear, convincing and unequivocal" evidence, namely, petitioner's "admissions" to legal conclusions of which he was wholly ignorant. The merits of the position speaks for itself.

D. Petitioner was Denied his Right to Retain Counsel in Violation of Due Process

1. There was nothing approaching a waiver under relevant case law

Where the right to counsel is raised to a constitutional level there is a "strong presumption against waiver of the right", Von Moltke v. Gillies, 332 U.S. 708, 723 (1947). The court in Von Moltke held:

[A] judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered. 332 U.S. 723-724. (Emphasis supplied)

Obviously, if the right to retain counsel at deportation hearings is raised to a constitutional level by this Court, a question specifically left open by prior decisions*, the instant colloquy fails this standard. Nowhere on the record is there anything approaching a "penetrating and comprehensive examination." To the contrary, there is a one minute dialogue where petitioner's clear request to seek counsel is ignored and petitioner berated into silence.

* See, Section D, 2, infra.

The colloquy was as follows:

"(IMMIGRATION JUDGE TO RESPONDENT)

. . . Do you accept my decision, sir?

A. Sir, if within those 30 days can I hire a lawyer?

Q. Well, if you want to have a lawyer we'll cancel the whole proceedings they'll put your case over. Do you want to have a lawyer?

A. (no answer)

Q. I asked you in the first place if you wanted a lawyer and you said no.

A. Sir, I can't hire a lawyer today because I don't have any money.

Q. Well, if you're going to hire a lawyer I'll give you until Friday, that's it. . . . to get a lawyer.

A. (no answer)

Q. Are you working?

A. (no answer)

Q. If you wa-nt [sic] a lawyer, sir, I'll give you until Friday.

A. (no answer)

Q. What do you want to do, sir? You want to accept my decision or do you want to get a lawyer?

A. Okay, I accept your decision.

(i) Petitioner requests counsel.

Petitioner, at the conclusion of the hearing, states "can I

hire a lawyer?"

This throws great doubt on respondent's claims that an offer of counsel, intelligible to petitioner, was made "at the outset" of the hearing.

(ii) . The judge answers a question with a question.

As if the question was not worthy of consideration, the judge then responded to the question with the same question: "Do you want to have a lawyer?"

After a period of silence, the judge berated petitioner: "I asked you in the first place if you wanted a lawyer and you said no."

Petitioner then explained that any previous question as to hiring a lawyer on the hearing date had pivoted in his own mind on his lack of funds that day ("I can't hire a lawyer today"), a fact nowhere inquired into by the judge in stark contrast to the court in Barthold:

At Barthold's deportation hearing the following colloquy occurred:

Q. You have the right to be represented by an attorney at this hearing, if you want, or you can go ahead if you do not choose to be represented. Do you want to be represented by a lawyer? A. Can the Government give me an attorney?

Q. No, the Government cannot provide an attorney for you in these cases because we are prohibited by law from doing so. It must be an attorney at your own expense. However, if you do not have the money to afford an attorney, I can adjourn the case and give you the opportunity to contact Legal Services to see whether they will provide an attorney for you. Do you

have - you say you do not have sufficient money to pay for an attorney? A. No, Sir.

Q. Well, do you want the opportunity IsicI to call Legal Services to see if they will provide you with an attorney? A. I will continue without an attorney.

Q. Very well. If at any time during the course of the proceedings you feel that you are unable to represent any more or that you think an attorney's answer will be necessary, just let me know and I will adjourn the case to still give you a chance to get one. You understand that you will have this continuing right until the case is completed?

A. Yes. (Emphasis supplied) "Barthold v. INS, supra."

The inadequacy of the present record need hardly be emphasized when compared to the above record.

(iii) The Judge decides upon a continuance and refuses to allow petitioner to stand by his decision

The court clearly initially decided to allow petitioner to retain an attorney:

"Well, if you're going to hire a lawyer I'll give you until Friday, that's it. . . . to get a lawyer."

It has long since been decided with respect to the right to counsel at criminal interrogations that:

"If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning."
(Emphasis supplied.) Miranda v. Arizona, 384 U.S., at 474, cited and approved, Michigan v. Mosley, 423 U.S. 96, 101, n. 7. (1975).

The only exception to this rule occurs when:

"In the absence of evidence of overbearing, statements then made in the presence of counsel might be free of the compelling influence of the interrogation process and might fairly be construed as a waiver of the privilege for purposes of these statements." Id., at 474 n. 44.

The instant case is a prime example of "overbearing" and patently fails to fit the exception.

Thus, there is a "heavy presumption" against waiver of right to counsel at trial, Von Moltke v. Gillies, supra. Even at a non-judicial interrogation the simple request for an attorney is sufficient to preclude further questioning of any kind. Miranda v. Arizona, supra. A request for counsel, therefore, bulldozed under by overbearing is surely nothing approaching a "knowing, intelligent" waiver of right to retain counsel at a deportation hearing.

Additionally, as the Moltke case notes:

[T]his case shows that routine inquiries may be inadequate. . . . Carter v. Illinois, 329 U.S. 173, 174-175. For the record demonstrates that the petitioner welcomed legal aid from all possible sources. (emphasis supplied).

Not only does the instant case show that "petitioner welcomed legal aid," but petitioner herein specifically requested it.

Moreover, just as

"the existence of the uncertainty . . . was obviously just below the surface of the petitioner's statements to the judge," Moltke, 332 U.S. at 725,

the instant case shows great reluctance on petitioner's part, if not outright confusion, as to his rights, all fostered by an overbearing attitude by the judge.

The effect upon a culturally displaced person being subjected to a proceeding steeped in complex regulations all in a foreign tongue is surely as compelling as the environmental considerations considered by the Miranda court, especially herein where a judge subjects a potential deportee to a virtual "third degree" simply because he requested time to retain counsel.

The present record, thus, flies in the face of long standing Sixth Amendment Right To Counsel Waiver cases:

This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court. Johnson v. Zerbst, 304 U.S. at 465. (Emphasis supplied)

The Immigration Judge obviously did not see his role as "protecting" nor did he produce on the fragmentary transcript available a "clearly determined" waiver. Even while attempting to narrow Miranda, the Supreme Court recently reiterated that the instant colloquy would fail a constitutional test were the judge a mere police interrogator.

But clearly the Court in Miranda imposed no such requirement, for it distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and directed that "the interrogation must cease until an attorney is present" only "[i]f the individual states that he wants an attorney." 384 U.S., at 474. Michigan v. Mosely, 423 U.S. 96, 101, n. 8. (1975).

Petitioner herein stated succinctly that he wanted an attorney and the Judge refused to allow that request to stand.

Pressing petitioner with respect to his rights is a far cry from simply informing him of what he had a right to do. If the rights listed in 8 C.F.R. § 242 were all given by informing a potential deportee that he could have a continuance to assure those rights and then asking the question until petitioner surrendered such right to continuance, then the regulatory scheme would quickly be swept entirely under the rug in favor of sub rosa proceedings bearing little resemblance to the procedural safeguards contemplated by the framers of the regulations, which is exactly what has occurred in this case.

2. Respondent's Misstatement of the Law of this Circuit with Respect to the Right to Counsel

Respondent contends that although the right to counsel has been "enforced strictly" by the Third and Seventh Circuits (Respondent's Brief, p. 13, n. 18), this Circuit "apparently has adopted the doctrine of prejudicial error." (Id.) Nothing could be further from the truth.

Henrique v. INS, 465 F.2d 119 (2d Cir. 1972), the first miscited case by respondent, concerned an indigent's claim to representation by counsel as a matter of due process at a deportation hearing where no prejudice appeared on the record.

The instant case concerns whether or not the judge's overbearing attitude engendered a defective waiver. It does not concern being deprived of government paid counsel and bears little relevance to Henrique.

This Court stated in Henrique v. INS, supra, that "Whether

the same standard would apply in a case of denial of a potential deportee's statutory right," (as claimed in the instant case), "we need not decide," at 520, n. 10.

Thus, this Circuit has specifically not ruled on the constitutional implications of failing to advise petitioner of his right to retain counsel, despite respondent's self-styled "prejudice rule" gleaned from a factually inapposite context, a confusion seen before by circuit courts. Chlomos v. INS, 516 F.2d 310, 314 (3d Cir. 1975).

Directly on point, however, is Ballenilla-Gonzalez v. INS, 546 F.2d 515 (2d Cir. 1976), which specifically affirms that petitioner's claims to due process violations must be "reached":

To reach the question of the extent of petitioner's statutory and constitutional rights to counsel, however, we would have to find that she did not herself waive any such rights.

3. The Fallacy of a Harmless Error Rule

The fallacy which inheres in applying a harmless error criteria to a right as fundamental as that to retain counsel is well illustrated herein. Petitioner's "admissions", found only on the printed judgment form and nowhere factually supported on any transcript, are obviously admissions to issues of law upon which petitioner was totally incompetent to respond. No attorney at law would have allowed a client to "admit" determinative legal conclusions. Yet, nowhere in the instant record is there any factual basis reproduced in the transcript for the deportation. Plain prejudice is thus bared on the record, regardless of what test this Court utilizes to evaluate the legal meaning of the dialogue between petitioner and the Judge concerning waiver of the right to counsel.

E. Failing to Keep One Accurate Record Works Invidious Discrimination on Petitioner and Violates Due Process

Respondent states that due to mechanical difficulties the tape of the deportation hearing was not entirely reproduced.

Where one alien is singled out and deprived of a record for appeal for rational reason, whether it be poverty or, in this case, administrative inefficiency, invidious discrimination has occurred. Griffin v. Illinois, 351 U.S. 12 (1951). Aliens have never been exempt from this constitutional protection. Wong Wing v. U.S., 163 U.S. 228 (1896); Yick Wu v. Hopkins, 118 U.S. 356 (1886).

Petitioner has thus effectively been denied a transcript. The tape is garbled and incomplete* and his appeal was reduced to a guessing game as to what occurred at the deportation hearing, although transcript fragments fail to reflect a succinctly informing of petitioner of his rights supposedly "assured" by regulation. Cheng Fan Kwok, supra, at 209. He has thus been discriminatorily singled out and his appeal efforts hampered, all in the face of statutes and regulations which state that deportation hearings can "only" occur upon a record, language stressed by the Supreme Court in Cheng Fan Kwok, supra, at 208-9.

The discrimination visited upon this petitioner is no less invidious than that which indigent defendants suffered before Griffin. It is not in accordance with rudimentary notions of "fair play" to subject petitioner to INS extra-judicial extrapolations as to the contents of a record whose very incompleteness violates clear statutory and regulatory mandates.

*. Even the transcript fragment reproduced is replete with cross-outs and corrections and is labeled "draft".

III. FURTHER DISTINCTION OF RESPONDENT'S AUTHORITY

A. Due Process Requirements Are Not Eviscerated by Congressional Power to Regulate Alien Immigration.

Respondent's reliance on Fiallo v. Bell, 45 U.S.L.W. 4402 (U.S. April 26, 1977) for the implied proposition that due process at a deportation hearing is somehow a denuded notion of "only" fairness is totally misplaced. Fiallo did not concern procedural due process at all. Fiallo concerned a direct constitutional challenge of a congressional act. In the court's words, "it is important to underscore the limited scope of judicial inquiry into immigration legislation." The court noted that appellants in that case did "not challenge the need or special judicial deference to congressional policy choices in the immigration context."

That respondents further cite The Japanese Immigrant Case, 189 U.S. 86 (1902) in which Justice Harlan states, "this Court has never held, nor must we now be understood as holding that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law'" is startling. The Third Circuit cites the case as follows:

"An alien subjected to deportation proceedings is entitled to due process of law. The Japanese Immigrant Case, 189 U.S. 86 (1903)." Chlomos v. INS, 516 F.2d 310 (3rd Cir. 1975).

B. Respondent's Attempt to Rewrite the Regulations and Change the Record

1. The alleged translation

On page 3 of Respondent's Brief, respondent states that "after the order to show cause was read and explained to Horng in his

language to ensure that he understood both the charge against him and the nature and purpose of the rights available to him at the deportation hearing. . .", he was released from custody. Nowhere does the present record verify or even imply that the order to show cause was read and explained to Horng in his Chinese language.

Respondent cites as authority for this statement, page 165 of the administrative record at footnote 6 on page 3 of Respondent's Brief. Respondent literally concedes that it has misconstrued the record. Footnote 6 provides as follows:

Horng was advised of these rights by the reverse side of the order to show cause issued against him. (AR 165). The reverse side also indicates that the order to show cause was personally served through the assistance of a Chinese interpreter.

Nowhere on page 165 of the administrative record, in direct distinction to the sample show cause order attached hereto as Exhibit "A", is there a sentence which states that the order to show cause was interpreted to petitioner. Respondent itself has construed the signature of the Chinese interpreter as meaning that the Service was "assisted" by a Chinese interpreter. As petitioner initially argued in its appellant's brief, the only viable construction of the instant record with respect to the rights which appear on its reverse side is that such rights were never interpreted to Horng.

2. Respondent's "New" Regulations

Of further significance, however, is respondent's intention to repeal those regulations requiring that rights be read to a petitioner at the deportation hearing and further intent to replace such regulation with the translation of the rights to petitioner outside

of judicial supervision when the order to show cause is served. Respondent stresses and reiterates that the order to show cause, on its reverse side, contained the rights not read to petitioner orally at the deportation hearing in violation of regulation. See, Respondent's Brief at page 15: "In this case Horng was afforded the statutory right when the order to show cause was served on him."

This reasoning wholly ignores the statutory language which plainly mandates that the regulations are the "sole and "exclusive" method by which an alien can be deported. It is unreasonable to allow respondent to sidestep this statutory requirement by arguing that a prior written appraisal of the right to counsel directed at petitioner, probably in English and never translated, fulfills the regulations. The written notice was allegedly translated "verbatim" to petitioner with the same efficiency that has produced a fragment of a transcript to date. Such "notice" in any event would not reasonably survive with the judge pressing petitioner until the judge's enforced waiver of the right to counsel transmuted to petitioner's cowed silence.

3. The burden of proof

That respondent states that Horng's deportability is supported on the record by "clear, convincing and unequivocal evidence", as required by Woodby v. INS, 385 U.S. 276, 286 (1966) [Resp.'s Brief, at p. 18], is nonsensical. Nowhere on the record is there any evidence of factual framework from which the deportability of petitioner can be gleaned. The entire transcript concerning that portion of the record upon which such evidence was allegedly elicited is not before the Court due to alleged mechanical failure of the recording device, according

to respondent. Once again, respondent indulges in a discussion of what the issues before Judge Schonfeld were and literally asks this Court to deem a deportation hearing and the factual basis for a deportation order as actually reflected in the transcript immaterial. Respondent states that Judge Schonfeld was presented "with a very simple issue of fact" and then extrapolates as to what facts were presented and reaches a conclusion for this Court! Nowhere on the record is this sequence of events present for this Court to conclude that deportability was established by the required evidentiary standard. Respondent argues that it is "preposterous" for Horng to argue that his deportability was not established by clear, convincing and unequivocal evidence. In response, petitioner submits that it is truly preposterous to argue that a record which reflects no facts in support of deportability somehow on the appellate level can be resurrected and extrapolated into existence in the face of a regulation which mandates that the entire deportation hearing be reproduced "verbatim".

CONCLUSION

For the foregoing reasons, petitioner requests that the decision of the Board of Immigration Appeals be reversed and the instant case remanded to the INS for a deportation hearing de novo.

Dated: New York, New York
November 12, 1977

Respectfully submitted,

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Of Counsel:

David C. Buxbaum

NOTICE TO RESPONDENT

ANY STATEMENT YOU MAKE MAY BE USED AGAINST YOU IN DEPORTATION PROCEEDINGS

THE COPY OF THIS ORDER SERVED UPON YOU IS EVIDENCE OF YOUR ALIEN REGISTRATION WHILE YOU ARE UNDER DEPORTATION PROCEEDINGS. THE LAW REQUIRES THAT IT BE CARRIED WITH YOU AT ALL TIMES

If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Immigration and Naturalization Service. You should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you should bring the original and certified translation thereof. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Order to Show Cause and that you are deportable on the charges set forth therein. You will have an opportunity to present evidence on your own behalf, to the receipt of evidence and to cross examine any witnesses presented by the Government. Failure to attend the hearing at the time and place designated hereon may result in a determination being made by the Immigration Judge in your absence.

You will be advised by the Immigration Judge, before whom you appear, of any relief from deportation, including the privilege of departing voluntarily, for which you may appear eligible. You will be given a reasonable opportunity to make any such application to the Immigration Judge.

NOTICE OF CUSTODY DETERMINATION

Pursuant to the authority of Part 242.2, Title 8, Code of Federal Regulations, the authorized officer has determined that pending a final determination of deportability in your case, and, in the event you are ordered deported, until your departure from the United States is effected, but not to exceed six months from the date of the final order of deportation under administrative processes, or from the date of the final order of the court, if judicial review is had, you shall be:

☐ Detained in the custody of this Service. ☐ Released on recognizance.

☒ Released under bond in the amount of \$ 2,500.00

You may request the Immigration Judge to redetermine his decision.

REQUEST FOR PROMPT HEARING

To expedite determination of my case, I request an immediate hearing, and waive any right I may have to more extended notice.

☐ I do ☐ do not request a redetermination by an Immigration Judge of the custody decision

Before:

(signature of respondent)

(signature and title of witnessing officer)

(date)

FINGERPRINTED

CERTIFICATE OF SERVICE

Served by me at Boston, Mass on July 18 1978 at 2:30 p.m.

BY HAND

(signature and title of employee or officer)

This form has been read and explained in the Chinese language, Anne Chen Zambon.

